STATE OF MICHIGAN

COURT OF APPEALS

MIDLAND COUNTY TREASURER, Plaintiff-Appellant,	UNPUBLISHED April 14, 2005
v	No. 249115 Midland Circuit Court
COUNTY OF MIDLAND, Defendant-Appellee.	LC No. 02-004734-CZ

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that she should be awarded attorney fees in connection with a lawsuit she initiated against the county board of commissioners to determine if the board was infringing on her rights as the elected treasurer. Defendant has a policy which requires elected officials to obtain approval for major changes in the job duties or responsibilities of employees under the elected official's supervision. Job descriptions are used to establish a salary grade for all county employees. Plaintiff reorganized her staff and updated job descriptions greatly increasing the responsibility of two staff positions. After an evaluation by an independent management consultant, defendant refused to accept the new job descriptions and accordingly the employees' salary grade did not increase to reflect the new responsibilities. Plaintiff made a request for representation against defendant to the county civil counsel. After this request was denied, she hired private counsel and brought a suit seeking a declaratory judgment against defendant and reimbursement for associated attorney fees. The trial court granted summary disposition to defendant on all issues. Plaintiff appeals the denial of attorney fees.[1]

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v*

[1] The parties have stipulated that two other issues raised by plaintiff in this Court are moot.

Detroit Bd of Ed, 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendant correctly argues that plaintiff is not entitled to attorney fees under MCL 49.73. Subsequent to the filing of the present appeal, this Court had cause to interpret MCL 49.73. In *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477; 682 NW2d 519 (2004), the plaintiff trial court brought suit against the county defendants and the defendant board of commissioners alleging that defendants had failed to properly fund the court, including the failure to properly fund a retiree health care and pension benefits plan. *Id.* at 481-482. After a series of countercomplaints and the filing of a separate action by the defendant counties against a third county, the cases were consolidated in the lower court. *Id.* at 482-484. Thereafter, the plaintiff sought to have its attorney fees and other related expenses paid by the counties. *Id.* at 483. Relying in part on MCL 49.73, the court entered an order indicating that the three counties were proportionally responsible for the plaintiff's attorney fees. *Id.* at 484-485. On appeal, this Court concluded that the statute did not apply where "judicial proceedings are initiated by a county official." *Id.* at 486. "We find no ambiguity in the language of the statute. . . . MCL 49.73 requires a county board of commissioners to employ attorneys to represent a county officer when the officer 'is named as a *defendant*, but contains no language authorizing, let alone requiring, employment of attorneys to represent a county official who initiates an action.' " *Id.* at 487 (emphasis in original), quoting *Wayne Co Sheriff v Wayne Co Bd of Comm'rs*, 148 Mich App 702, 711-712; 385 NW2d 267 (1983). Therefore, because plaintiff in the case at hand initiated the present lawsuit and was at all times postured as plaintiff, she cannot recover her attorney fees under the statute. *46th Circuit Trial Court*, *supra* at 487-488.

Despite the clear language of MCL 49.73, *46th Circuit Trial Court* agreed with the lower court that an award of attorney fees was warranted under the inherent power doctrine. *46th Circuit Trial Court*, *supra* at 488. While this doctrine does not apply here because plaintiff is not a member of the judiciary, *id.* at 489-490, *46th Circuit Trial Court* implicitly recognized that alternative, non-statutory bases for such an award do exist (in that case, the inherent power doctrine).

One such alternative basis, relied on by plaintiff, was examined by this Court in *City of Warren v Dannis*, 136 Mich App 651; 357 NW2d 731 (1984). However, we find that plaintiff's reliance on *Dannis* is misplaced. Initially, we note that *Dannis* is persuasive authority only. MCR 7.215(J). In *Dannis*, the plaintiff city and the defendant treasurer were in a dispute regarding who had the authority to decide where certain city monies should be invested. *Id*. at 654. After the plaintiff and the city council initiated a mandamus action, the council denied the defendant's previously filed request for an attorney. *Id.* at 655. Thereafter, the defendant "retained the law firm which she had already consulted as to what her charter responsibilities were." *Id.* Noting that Michigan "appellate courts have long tried to consider the need for public officials to reasonably exercise their discretion in what they in good faith believe is the exercise of the powers of their office," *id*. at 659, *Dannis* affirmed the circuit court's award of

attorney fees to the defendant, *id*. at 663. In so doing, *Dannis* observed that "good faith and the reasonableness of a public official's actions are proper elements to consider in determining whether the official should be indemnified for attorney fees incurred to assist in the performance of official duties." *Id.* at 662.

As in *Dannis*, the present lawsuit stems from a dispute on the extent of the powers possessed by quarrelling government entities. However, it is not clear from the facts set forth in *Dannis* whether the award of attorney fees included fees for advice the defendant received prior to the filing of the writ. *Id.* at 655. It would seem reasonable to assume that the majority of the $47,788.66 awarded in *Dannis* was for services rendered in defense of that action. To that extent, *Dannis* is distinguishable given that plaintiff in the case at hand initiated the present lawsuit. Nonetheless, it is possible that the defendant in *Dannis* was awarded monies for legal advice secured prior to the initiation of the lawsuit and in performance of her perceived duties. For this portion of the award, the analysis turns on *Dannis's* postulated rule that reimbursement has long been recognized as appropriate for public officials reasonably exercising the powers of their office.

In support of this rule of reimbursement, *Dannis* cites *Smedley v Grand Haven*, 125 Mich 424; 84 NW 626 (1900) (hereinafter *Smedley II*), and *Exeter Twp Clerk v Exeter Twp Bd*, 108 Mich App 262; 310 NW2d 357 (1981). We review *Smedley II* first given that it is binding precedent.

Smedley II has a complicated and protracted legal history. In *Smedley II*, the plaintiffs were attorneys who had initially represented the mayor of Grand Haven in two separate actions filed against the city clerk[2] and the city council. *Smedley II, supra* at 426. After resolution of the two suits, the attorney bills were submitted to the city common council for payment. *Id.* When an alderman moved that the mayor be allowed a certain sum for attorney fees in the action against the city clerk, the council's tie vote was broken by the vote of the mayor in favor of the motion. *Id.* Subsequently, four alderman brought suit against the mayor "to compel him to determine that the motion had not been carried." *Id.* That case was entitled *Bishop v Baar*. *Id.* The circuit court ultimately set aside the mayor's action in voting on the motion. *Id.* Thereafter, in *Smedley v Kirby*, 120 Mich 253; 79 NW 187 [1899] [hereinafter *Smedley I*]), attorney Smedley sought to compel the clerk to pay the fees which totaled $349.50. *Smedley II, supra* at 426. The circuit court heard both *Bishop* and *Smedley I* together. *Smedley I, supra* at 255. Smedley lost in the circuit court, but on appeal the Supreme Court concluded that the mayor was not precluded from breaking the tie vote of the common council and voting on the motion, and ordered that the claimed monies be paid. *Id.* at 257-258.

Finally, in *Smedley II*, the plaintiff attorneys sought to have the city pay for services rendered in *Bishop v Baar* both in the circuit court and in our Supreme Court. *Smedley II, supra* at 425, 428.[3] *Smedley II* denied the claim for fees incurred as a result of proceedings before the

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[2] *Baar v Kirby*, 118 Mich 392; 76 NW 754 (1898).

[3] The *Dannis* Court appears to have misunderstood which attorney bills were in issue in *Smedley II*. *Dannis* observes that the bill in issue in *Smedley II* was for $349.50 and stemmed from the (continued…)

Supreme Court for the reason that *Bishop v Baar* was never before it. *Smedley II, supra* at 428. However, the Court concluded that "it was a question for the jury to determine whether any exigency existed which warranted the mayor in employing counsel" in the lower court proceedings. *Id.* at 429. While *Smedley II* reviewed the history of all the involved cases, the only question before it related to *Bishop v Baar*. Thus, it could be argued that because the mayor was the defendant in *Baar*, the rule of *Smedley II* does not apply to the case at hand.

However in support of its holding, *Smedley II* cited with approval *Louisville v Murphy*, 86 Ky 53; 5 SW 194 (1887). In *Murphy*, the mayor of Louisville had sought legal advice and then filed suit to restrain city officials from collecting a tax in the absence of an ordinance for the collection of said tax. *Id.* at 65. *Murphy* concluded that "[i]n such an emergency," the mayor had the power to employ counsel. *Id.* at 66. The court reasoned as follows:

> We think the mayor has no general power to authorize litigation in behalf of the city, or to control it. If so, he could disregard the legislative will of the municipality, bringing and dismissing suit at his pleasure. It is certainly an exceptional case where it should be allowed, and one seldom arises; but the emergency in this case justified the act, as all the parties acted, no doubt, in best of faith. [*Id.*]

The outlines of this emergency doctrine were further explored by this Court in *Exeter*. The plaintiff in *Exeter* was a township clerk charged with the responsibility of reviewing the sufficiency of nominating petitions. *Exeter, supra* at 265. When the township attorney declined the plaintiff's request for legal advice on the validity of the petitions, the plaintiff sought private legal advice. *Id*. Subsequently, rejected petitioners filed a petition for a writ of mandamus against the plaintiff in her official capacity. *Id*. *Exeter* concluded that the township board abused its discretion in refusing to indemnify the plaintiff for her private legal expenses. *Id.* at 272-273. The Court reasoned, in part, as follows:

> While a municipal corporation clearly has the discretion to determine whether an official may be indemnified for legal expenses incurred in the faithful discharge of his or her duties, it may constitute an abuse of discretion, as in this case, to refuse to provide legal representation or to indemnify the official for legal expenses incurred where pressing necessity or emergency conditions require legal representation. [*Id.* at 272.]

Although plaintiff in the case at hand properly requested representation from the county's civil attorney in this matter, she does not show that an emergency compelled her to seek private

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(…continued)

two suits brought by the mayor of Grand Haven against the city clerk and city council. *Dannis, supra* at 659. However, that bill was the subject of *Smedley I*, not *Smedley II*. In fact, in *Smedley II*, our Supreme Court observed that the $349.50 had been paid. *Smedley II, supra* at 427. The amount in issue in *Smedley II* was $340.42, which consisted of $130 for services rendered in the circuit court in the case of *Bishop v Baar*, and the rest for services rendered in the Supreme Court for the same case. *Id.* at 425, 428. Again, in *Bishop v Baar*, the mayor was the defendant.

counsel when that request was denied. She and the county were certainly at odds over the issue of which body could define the duties of plaintiff's deputy and chief deputy, and there is no indication that plaintiff was acting in bad faith when she pursued the matter in court. However, she was not facing a looming statutory deadline, as was the clerk in *Exeter*, nor was she faced with trying to prevent a perceived illegal action by the legislative branch, as in *Louisville*. Rather, plaintiff was primarily seeking to protect what she perceived as an encroachment on her authority to define the duties of her deputy and chief deputy. This is not the type of "exceptional" or "pressing" emergency situation that would justify an award of attorney fees under the emergency doctrine. Failure to expeditiously pursue this matter would not threaten the welfare of the city, the political process, or the integrity of the functions of government. Accordingly, the denial of attorney fees was proper.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder